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IN THE

Supreme Court of the United States

TERM COMMENCING OCTOBER, 1972

No. 72-1272

DOROTHY C. BELTRONE, *Petitioner,*

v.

GENERAL MOTORS CORPORATION and
PAUL BROTHERS, INC., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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March, 1973

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JURISDICTION

Petitioner in this Court was the Plaintiff below. Pursuant to 28 U.S.C. 1254(1), the jurisdiction of this Court is invoked to review the Judgment of the U.S. Court of Appeals for the District of Columbia Circuit filed in this case on December 18, 1972. That Judgment affirmed an Order of the United States District Court for the District of Columbia, filed on October 20, 1971, dismissing petitioner's case "for failure of plaintiff to prosecute". The Court of Appeals Judgment stated no reasons for affirming the lower court's order, and gave no indication of where there could be found any

actions or failures to act on the part of the plaintiff which could at all make plaintiff guilty of a failure to prosecute.

QUESTIONS PRESENTED

Whether plaintiff could possibly be held guilty of a failure to prosecute her suit below by reason of any actions or failures to act on her part.

Whether the lower court or the Court of Appeals cited any actions or failures to act on the part of the plaintiff as the basis for finding that plaintiff was guilty of a failure to prosecute her suit below.

Whether plaintiff was found guilty of a failure to prosecute without having done anything that justified such a finding; and whether, therefore, the defendants have been improperly shielded from public scrutiny and public responsibility as to defectiveness and safety-characteristics of the automobiles they put out on the road and into the hands of innocent consumers.

STATEMENT OF THE CASE

On June 29, 1970 plaintiff filed a complaint for damages for serious personal injuries caused by the defective accelerator-throttle linkage in a new automobile manufactured by defendant General Motors and sold to plaintiff by defendant Paul Brothers. On April 29, 1971 there was a full formal Pretrial Conference before the Assistant Pretrial Examiner in the lower court; and a full report of this pretrial proceeding was filed in the trial court on April 29, 1971. The parties had no further dealing with the trial court until October 18, 1971, when they appeared at a calendar call hearing upon the call of the trial judge.

Up to this calendar call hearing of October 18, 1971, plaintiff had not asked for any postponements or extra time, and had not been late in submitting anything or unprepared for any step in the trial process. It is true there had been a dispute over whether defendant General Motors could force plaintiff's expert witness to be deposed contrary to Rule 26(b)(4) of the Federal Rules of Civil Procedure, which permits discovery from an expert witness only by interrogatory in the absence of a court order. But defendant General Motors, after threatening to take the matter to the trial judge, and darkly warning that all sorts of penalties would ensue therefrom, quietly dropped the matter. It is also true that, due to factors beyond her control, plaintiff was unable to meet the 30-day deadline for responses to General Motors' interrogatories to one of her two expert witnesses on automotive engineering. But defendant General Motors, which was aware of the circumstances preventing the responses to the interrogatories, never sought to avail itself of the specific remedy provided in Rule 37(a)(2) of the Federal Rules of Civil Procedure, which states: "If . . . a party fails to answer an interrogatory . . . the discovering party may move for an order compelling an answer. . . ." In any event, plaintiff was quite prepared to go to trial with her other expert, who was Ralf Hotchkiss, chief engineering expert of the Center for Auto Safety, now also directing the Center for Concerned Engineering, and co-author with Ralph Nader and Lowell Dodge (Director of the Center for Auto Safety) of the best-selling book *What to Do with Your Bad Car—An Action Manual for Lemon Owners.* Mr. Hotchkiss, after consulting within the Ralph Nader organization, and after examining the technical details of plaintiff's case,

had made himself available to testify as an expert witness for plaintiff without fee and as a public service.

At the calendar call hearing on October 18, 1971, plaintiff was quite ready to go to trial, if a trial date were set as a result of that "ready call". The trial judge, however, did not undertake in any way to ascertain how ready the parties were for setting of a trial date. Instead, right off the bat, he entertained an oral motion by defendant General Motors that plaintiff's action be dismissed. After asking plaintiff's counsel what he had to say about this motion, and hearing briefly from the counsel for the other defendant, the trial judge dismissed plaintiff's suit for lack of prosecution. He orally stated three reasons for dismissing for lack of prosecution. The first was expressed as follows:

> Well, we sent this to pretrial as long ago as last April on the assumption that discovery was completed, or soon would be completed. We are no further along now in October than we were in April.

The trial judge in no way indicates here that plaintiff was guilty of causing any delay. In fact, an examination of the record would readily show that it was General Motors which was guilty of causing unwarranted delay in the discovery process, by such deceptions as trying to depose plaintiff's expert witness when the rules allowed only interrogatories. The second reason for dismissing plaintiff's case was expressed by the trial judge as follows:

> At most, this accident happened in 1967, the first of July and the suit was filed one day before the expiration of the statute of limitations.

In response to this, counsel for plaintiff said: "Your Honor, may I suggest that that is not relevant to the question of whether it should be . . . (sic)". And the trial judge interrupted to say: "It is not relevant, but it indicates a general interest in pursuit of the litigation which, I think, has been lacking almost from the start." Of course, there is nothing here which has anything to do with failure to prosecute. Failure to prosecute has to do with action or inaction after a suit is filed. All the delay before a suit is filed, provided it is filed before the statutory limitation has expired, cannot rightly cause dismissal of the suit. The third reason for dismissing plaintiff's suit was expressed by the trial judge as follows:

> Prior to that time [the Pretrial Conference of April 29, 1971], we dismissed the case for want of prosecution, or we were about to when we gave Mrs. Beltrone an opportunity to get another lawyer and Mr. Evans withdrew.

The reference here is to the hearing on January 15, 1971 when the trial court granted the motion of plaintiff's original counsel to withdraw from the case. This counsel's withdrawal was entirely for his own purposes and not in any way called for or caused by plaintiff. This incident could not possibly involve any failure to prosecute on the part of the plaintiff.

REASONS FOR GRANTING THE WRIT

The facts of this case do not show that plaintiff was in any way guilty of a failure to prosecute her suit in the trial court. Nevertheless the trial judge dismissed her suit, citing no actions or failures to act

on plaintiff's part which involved any failure to prosecute, but citing, instead, reasons which, in each and every one of them, had nothing to do with failure to prosecute. The Court of Appeals affirmed the trial judge's dismissal by a brief and unrevealing Judgment which said not a word about where and how the plaintiff could be found guilty of failure to prosecute.

Two factors of great social importance militate in favor of the grant of a writ of certiorari by this Court in this case:

(1) A grave injustice has been done, shielding a great powerful corporation from "a little old woman", the plaintiff in this case. This injustice should be remedied by seeing that plaintiff is given her day in court. This is all that plaintiff, with all her heart, pleads for. From society's point of view, the fabric of democracy is rent a little bit, and we are all diminished a little bit, if a judicial result such as this is allowed to stand, if plaintiff is thrown out of court for no rational reason and just to get rid of her case.

(2) Plaintiff's case involves important questions of defects in automobiles put out by General Motors, posing great dangers to the public when such defective automobiles are unloosed upon roads and highways. Plaintiff's case also involves questions of General Motors pushing possible automobile defects out of sight and out of mind, until someone—a Ralph Nader or a Dorothy C. Beltrone—forces General Motors to face up to the possible defects in its automobiles. To permit plaintiff's case to be disposed of by an unmerited dismissal for failure to prosecute encourages General Motors in its gravely anti-social irresponsi-

bility towards automobile defects that can ruin lives and endanger many people.

Respectfully submitted,

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March, 1973

Filed Dec. 18, 1972

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1096

(No Opinion)
September Term, 1972

Civil Action 1943-70

DOROTHY C. BELTRONE, *Appellant*
v.
GENERAL MOTORS CORPORATION, ET AL

Appeal from the United States District Court for the District of Columbia.

Before: McGowan, MacKinnon and Robb, Circuit Judges.

Judgment

THIS CAUSE came on for consideration on the record on appeal from the United States District Court for the District of Columbia, and briefs were filed herein by the parties. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

ON CONSIDERATION OF THE FOREGOING, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

Neither the District Court nor the Court of Appeals wrote an opinion.

JURISDICTION

The petition for a writ of certiorari was timely filed on March 17, 1973. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1) (1964).

QUESTION PRESENTED

Whether the District Court's dismissal of plaintiff's (petitioner's) suit for failure to prosecute was an abuse of discretion.

STATEMENT OF THE CASE

On October 20, 1971, the United States District Court for the District of Columbia entered an order granting General Motors' motion to dismiss plaintiff's complaint for failure to prosecute. The Court denied plaintiff's motion to vacate the dismissal and to reinstate the action. The United States Court of Appeals for the District of Columbia affirmed the judgment of the District Court on December 18, 1972.

STATEMENT OF FACTS

On July 1, 1967, plaintiff sustained injury arising out of a collision between her automobile and a tree. She alleged that the accident and resulting injuries were caused by defects in an automobile manufactured by General Motors Corporation which she purchased from Paul Brothers, Inc., in 1966.

On June 29, 1970, three years after the accident, and two days before the statute of limitations expired, suit was filed in the District Court. Answers to the complaint were filed in a timely fashion and plaintiff's deposition was taken on September 2, 1970. Within four months after suit was initiated, discovery had been completed with a single exception. Plaintiff had not permitted discovery of her engineering expert expected to testify at trial. The expert retained by plaintiff in September, 1970 withdrew from the case prior to being deposed.

At the January 15, 1971, status call, plaintiff's attorney sought permission of the Court to withdraw from the case. He filed a written motion and supporting memorandum stating that a dispute had arisen between him and the plaintiff concerning the merits of plaintiff's case. After counsel was permitted to withdraw, the Court spoke directly with the plaintiff who was present in the courtroom advising that she would be given approximately sixty days to obtain other counsel if she desired to do so. At a subsequent status call on March 10, 1971, a new attorney entered his appearance. He had been retained by plaintiff on the day prior to the status call.

During the status call on March 10, 1971, General Motors Corporation and Paul Brothers, Inc. moved to dismiss the case for want of prosecution. The Court denied the motion but issued a strong warning to plaintiff, indicating that the names of expert witnesses must be provided so that discovery could be completed.

By letter of March 17, 1971, plaintiff's counsel designated Dr. Samuel J. Raff as the engineering expert retained to testify at trial and later listed him as a witness in the pretrial statement filed on April 30, 1971. Repeated efforts to arrange for the engineer's deposition were fruitless. Finally, General Motors caused a summons to be issued on May 25, 1971, which ordered that Dr. Raff appear for deposition on June 17, 1971. Shortly after the subpoena was served, plaintiff advised by letter of June 18, 1971, that Dr. Raff had withdrawn from the case. In his stead, Robert P. Burruss of the same engineering firm was designated as the next expert witness.

Pursuant to an agreement between plaintiff's counsel and counsel for General Motors, the deposition of Mr. Burruss commenced on June 24, 1971. The witness, a mechanical engineer answered questions related to his expertise and his educational background only. When queried as to his professional opinion relative to facts and circumstances of the accident or to the automobile's defects, he was directed not to answer by plaintiff's counsel. Since plaintiff's counsel made it impossible to proceed, the deposition was discontinued.

On July 29, 1971, in a further effort to obtain discovery of plaintiff's expert witnesses, defendant General Motors served plaintiff with interrogatories pursuant to Rule 26(b)(4)(A)(i), Federal Rules of Civil Procedure, which were designed to elicit the expert's opinion and the facts upon which it was based. The plaintiff had not responded to the interrogatories at the time the District Court dismissed the case on October 19, 1971.

At the October 18, 1971, status call, General Motors moved a second time for dismissal of plaintiff's action. Paul Brothers, Inc., joined in the motion and after argument it was granted. Subsequently, a motion for reconsideration of the dismissal and for reinstatement of the case was denied. On appeal, the Court of Appeals unanimously affirmed the judgment of the District Court and this Petition followed.

ARGUMENT

REASONS TO DENY THE WRIT

There are no appropriate grounds for granting the petition for a Writ of Certiorari. This case turns on its own peculiar facts and the issue is narrowly limited to whether the District Court's dismissal of

plaintiff's action was an abuse of discretion. By affirming the lower Court's decision, the United States Court of Appeals for the District of Columbia found no abuse. There is no conflict in the circuits and no important question of Federal law is presented. Moreover, an analysis will indicate that there is no departure from the usually accepted standards and procedures by the Courts below which could warrant this Court's exercise of its supervisory power. Finally, the case lacks any important issue which could be a basis for granting the Writ.

I

The Decision Below Is Correct

Clearly, the District Court has the power to dismiss a lawsuit for want of prosecution. This Court in *Link* v. *Wabash Railroad Co.,* 370 U.S. 626 (1962), affirmed a lower court's dismissal for failure to prosecute, stating:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts . . . It has been expressly recognized in Federal Rule of Civil Procedure 41(b) . . ." (Id. at 629)

Since dismissal is the most severe sanction which the Court may impose, its use must be tempered by the careful exercise of judicial discretion. Undoubtedly, the Court of Appeals was mindful of its earlier decision in *Shaeffer* v. *Warehouse Employees Union, Local No. 730,* 132 U.S.App.D.C. 401, 408 F.2d 204 (1969), cert. denied 395 U.S. 934 (1969), where it af-

firmed the principle that the District Court had the "inherent power" to dismiss a case for failure to prosecute. The Court held:

> "Our function is to determine whether the District Court 'abused its discretion' in dismissing the case .... We feel that under the relevant authority it is clear that the trial judge is entitled to inspect the entire procedural history of the case before deciding whether to dismiss it for want of prosecution . . . Each case, of course, must be evaluated within its own procedural context." (132 U.S.App.D.C. at 403)

An examination of the procedural history of the instant case demonstrates that the District Court's dismissal for want of prosecution was not an abuse of discretion and that the Court of Appeals was justified in affirming the lower Court. All discovery, except that which related to plaintiff's expert witness, was completed by October, 1970. A year of inexcusable delay, attributed solely to the plaintiff, followed. Plaintiff's engineering expert retained in September, 1970 withdrew from the case prior to the time discovery could be undertaken. Four months later, on January 15, 1971, plaintiff's counsel withdrew as a result of a dispute concerning the merits of the case. The District Court permitted plaintiff to obtain other counsel, who entered an appearance at a status call on March 10, 1971. At that time, the Court directed plaintiff to provide the names of expert witnesses so that discovery could be completed, and further indicated that if plaintiff desired to try the case without an expert the matter would be sent to pretrial. During that status call, the Court denied General Motors' motion to dismiss the case but made it unmistakably clear that further

delay by plaintiff would not be tolerated and could result in dismissal for want of prosecution.

Shortly thereafter, plaintiff did provide the name of an expert but did not permit discovery. Three months later, after repeated attempts by General Motors to set a deposition, the plaintiff's second automotive engineer withdrew from the case. A third expert was designated in June, 1971. By agreement, his deposition commenced on June 24, 1971, but was discontinued when plaintiff's counsel refused to permit the witness to answer questions. Subsequently, interrogatories designed to elicit the experts' opinions and conclusions were served on plaintiff. There was no response to those interrogatories which remained unanswered two and one-half months later when the case was dismissed.

When the parties appeared at the October 18, 1971 status call, more than seven months had passed since the Court warned the plaintiff. During that period, plaintiff had not progressed in the prosecution of her lawsuit. Moreover, the plaintiff ignored the District Court's March 10, 1971 warning that the case could be dismissed for want of prosecution in the event of further delay. When the case was dismissed, General Motors and Paul Brothers, Inc., were no closer to obtaining discovery of plaintiff's experts than they were seven months earlier. On October 18, 1971, a hearing was held on the motion to dismiss even though this Court in *Link, supra,* indicated that the District Court may dismiss a complaint for failure to prosecute without affording notice of its intention to do so, and without providing an adversary hearing.

This case was dismissed at the third status call following a year of inactivity during which the Court

clearly warned that further delay would not be permitted. Plaintiff caused unreasonable delay of sufficient degree to warrant dismissal in the proper exercise of the District Court's discretion. The Court of Appeals found no abuse of discretion. No further review is needed.

II

No Important Issue Is Presented as a Basis for Granting the Writ of Certiorari

Petitioner argues that the Writ of Certiorari should be granted because the case "involves important questions of defects in automobiles" (Petition for Writ of Certiorari P. 6). Clearly, petitioner has not articulated a basis for granting the Writ as commonly recognized in Supreme Court Rule 19. The petitioner has already had appellate review of her case. The Petition for Certiorari is wholly without merit and represents merely an attempt to have still another hearing. It is not the function of this Court to provide a further hearing where the sole issue is whether the District Court abused its discretion.

The case is not one in which there are "special and important reasons" for granting the Writ as required by Supreme Court Rule 19. In *Rice* v. *Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1954) this Court said that " 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic" (349 U.S. at 74). The petition turns upon its own special facts. This Court has been consistent in its denial of review where the lower Court's decision is based on particular facts. Moreover, there is no indication that the Courts below departed from the accepted and usual course of judicial proceedings

so as to warrant the exercise of the Supreme Court's power of supervision. Thus, in this case which presents no conflicting decisions, no unique or important principles of law and no issue of general importance, the Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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